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73-7031

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

-v.-

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPRIME COURT OF NORTH CAROLINA

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INDEX

	Page
Citation to Opinions Below	1
Jurisdiction	1
Question Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	3
How the Federal Question Was Raised and Decided Below	9
Reason for Granting the Writ	10
The Court Should Grant Certiorari to Consider Whether the Imposition and Carrying Out of the Sentence of Death for the Crime of Murder Under the Law of North Carolina Violates the Eighth or Fourteenth Amendment to the Constitution of the United States	10
Conclusion	12

TABLE OF CASES

	Page
Dillard v. North Carolina, No. 73-6875	10,11
Furman v. Georgia, 408 U.S. 238 (1972)	10,11
State v. Albert Carey, __N.C._, __S.E.2d _, North Carolina Supreme Court No. 19 (Mecklenburg) (July 1, 1974)	11
State v. Anthony Carey, __N.C.__,__S.E.2d__, North Carolina Supreme Court No. 16 (Mecklenburg) (July 1, 1974)	11
State v. Davis, Lenoir County Superior Ct., No. 74-Cr-1102, 74-Cr-1103 (June 16, 1974)	11
State v. Foddrell, Caswell County Superior Ct., No. 73-Cr-1439 (June 7, 1974)	11
State v. Foster, Lenoir County Superior Ct., No. 74-Cr-1248, 74-Cr-1249 (June 16, 1974)	11
State v. Gordon, Mecklenburg County Superior Ct., No. 73-Cr-56187, 73-Cr-56188 (May 29, 1974)	11
State v. Fernando Hunt, Vance County Superior Ct., No. 74-Cr-550, 74-Cr-551, 74-Cr-552 (June 14, 1974)	11
State v. Rozell Hunt, Anson County Superior Ct., No. 74-Cr-1538 (June 13, 1974)	11
State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974)	9,10
State v. Lowery, Alamance County Superior Ct., No. 73-Cr-8718 (June 13, 1974)	11
State v. Robbins, Guilford County Superior Ct., No. 74-Cr-19674, 74-Cr-19771 (May 31, 1974)	11
State v. Simmons, Nash County Superior Ct., No. 74-Cr-194 (June 13, 1974)	11
State v. Stegmann, Cumberland County Superior Ct., No. 73-Cr-30527, 73-Cr-30615 (May 16, 1974)	11
State v. Strickland, Onslow County Superior Ct., No. 74-Cr-3671, 74-Cr-3672, 74-Cr-10568 (June 29, 1974)	11
State v. Thompson, Rutherford County Superior Ct., No. 74-Cr-1222 (June 1, 1974)	11
State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973)	2,3,9, 11

Statutes:

Page

28 U.S.C. §1257(3) 1

North Carolina General Statutes:

§14-17, as amended by S.B. 157, Chap. 1201, 1973 Sess. Laws (2nd Sess. 1974) 3

§14-17 2,3

§15-187 3

§15-188 3

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STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered on April 10, 1974.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at 285 N.C. , 203 S.E.2d 803 (1974) and is set out in Appendix A hereto, pp. 1a-13a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of North Carolina was entered on April 10, 1974 and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTION PRESENTED

Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States ?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> § 14-17. Murder in the first and second degree defined; punishment.- A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison. 1/

1/ As construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

> § 15-187. Death by administration of lethal gas.- Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor.
>
> § 15-188. Manner and place of execution.- The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article.

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of North Carolina, entered on April 10, 1974, affirming petitioner's conviction and death sentence. Petitioner, Jesse Thurman Fowler, a black man, was sentenced to die on September 27, 1973, in the Wake County Superior Court of North Carolina upon conviction for the first degree murder of an acquaintance, Mr. John Griffin. 2/

2/ Petitioner's sentence of death was imposed under N.C. Gen. Stat. §14-17, as construed by the Supreme Court of North Carolina in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). The North Carolina Legislature enacted a statute, S.B. 157, Chap. 1201, 1973 Sess. (2nd Sess. 1974) on April 8, 1974 which imposes the death penalty for first degree murder, but this statute provides that it is applicable to offenses committed after its ratification.

The State's evidence showed that petitioner and John Griffin had been drinking and throwing dice at Sylvester Jones' house on the morning of July 1, 1973. Jones briefly left the game, and asked petitioner to watch his ten dollar bill. When Jones returned, the money was gone, and he testified that petitioner told John Griffin to return the money to Jones, which Griffin did. Later that afternoon, at the King's Lounge, Jones heard Griffin tell petitioner that "if he pulled that shit like he pulled this morning, that he was going to kick his ass." R. 59. Petitioner "told him he wasn't going to do nothing to him," id., but Griffin invited him outside, and a fight ensued in which Griffin hit petitioner in the face, bloodying and breaking his nose, kneed him in the face, and pummelled him as he lay on the ground. After Jones broke up the fight, petitioner left, and Jones testified that "Griffin came up to me then and asked me for my pistol. He knew that I had a pistol. At the time, I did not have it on me. So I told him . . . I couldn't do that." R. 60.

Shortly after 8:00 p.m. on July 1, 1973, Mrs. Mary Raines was conversing with John Griffin and his two daughters in front of her dwelling at 1300 Branch Street in the Walnut Terrace area of Raleigh, North Carolina, when a car with two men in it drove up. Mrs. Raines heard Griffin say to a man in the car, "I am tired of you all bugging me," R. 17, after which the car drove away and he returned to Mrs. Raines and the children. A few minutes later, a man ran up from the direction in which the car had gone and fired two shots at Griffin, but Mrs. Raines

was not able to identify the gunman. The driver of this car, Johnny Frazier Dolby, testified that he had given petitioner a ride in the early evening of July 1 and that petitioner, who had been drinking some, explained his bloody shirt by stating that he had been in a fight with John Griffin. When the two men chanced upon Griffin at 1300 Branch Street, Griffin told petitioner, "I don't want to fight you no more. I want you to go on home." R. 24. Petitioner said nothing, and Dolby drove away, only to be told to stop by petitioner after driving a short distance. Petitioner got out of the car and went back toward Branch Street.

Another acquaintance of petitioner's, Charles McCoy, testified that as he was walking to his home on Branch Street at about dusk on July 1, he heard Griffin declare to petitioner and another man in a car: "Take him on before I make him use what he has in his pocket." R. 35. A few minutes later, McCoy noticed petitioner walking along Branch Street from the direction the car had driven away. He testified that "I think [petitioner] stopped [Griffin's daughter] and asked where was John [Griffin]." R. 31. McCoy, who was walking toward petitioner, felt someone bump him from behind and saw that Griffin was standing or crouching behind him. He then observed petitioner step to the side and fire a pistol twice at Griffin. McCoy, who sustained powder burns on his left hand, saw petitioner walk away, as Griffin stumbled down the embankment to the apartments below.

Griffin's eleven year old daughter, Janice, testified:

> "I saw my father hiding behind McCoy . . . . My father was walking behind him, crouched down . . . . I saw my father get behind Mr. McCoy when Jesse [petitioner] came out of the car . . . . My father got behind McCoy and started tipping [tip-toeing?] behind him . . . . My father tipped behind McCoy about two car lengths. McCoy was walking very slowly."

R. 49-50. Griffin's nine year old daugher, Paula, testified that a few minutes before the shooting, petitioner met her on Branch Street, and asked her where her father was. She replied that she didn't know. R. 51. Both girls testified that they saw petitioner shoot Griffin. R. 48-50, R. 50-52. In a statement given to the Raleigh police at 2:20 a.m., July 2, petitioner said that he had been drinking heavily on the day of the shooting, and that after the fight at the King's Lounge, he had gone to Walnut Terrace in a car driven by Ronald Dolby to see a friend when he happened upon John Griffin once more. Griffin wanted to fight again, but petitioner asked Dolby to let him out of the car so Dolby "would not get into any trouble." R. 45. When Griffin "came after him," petitioner "turned and shot at him and missed. I then shot at him again and hit him. I dropped the gun and walked away." Ibid.

Sylvester Jones testified that he found out in the late evening of July 1 that John Griffin had been killed and that he went to see petitioner, who admitted the shooting, and stated that "he wanted to turn himself in, but in a way, he was kind of scared." R. 62. Jones accompanied petitioner to the police station where petitioner made a statement to the police concerning the shooting.

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Jones stated that Griffin "got into a lot of arguments" and "liked to talk a whole lot. He would shoot a lot of bull." R. 63 Dolby testified that "Some folks say that [Griffin] will knock you in the head if you turn your back" and that when Griffin was drinking, he had a "big mouth." R. 28.

Petitioner presented nine witnesses in his defense and also testified at some length himself. Two witnesses testified that they had planned to go fishing with petitioner on July 1, and that it was their usual practice to carry pistols to protect themselves against snakes. R. 53-54, 57-58. One of the witnesses to the fight between petitioner and John Griffin outside the King's Lounge, Charles Gene Rogers, heard Griffin ask for a pistol after the fight. R. 69. Rogers told petitioner, "Man, you better go ahead on because John Griffin is trying to get a pistol to kill you." R. 69-70. Rogers testified that he had known Griffin "a pretty good while":

> "He had a lot of fights and a lot of arguments. Well, I would say he could cause some danger, he had a big mouth ....I know that he always runs off at the mouth and continues to get whopped a lot by his mouth."

3/ R. 70.

3/ Petitioner testified that his sister-in-law lived in Walnut Terrace, and that he went to her house in that area on the evening of July 1. As he and Dolby were driving on Branch Street, Griffin flagged the car down, snatched the car door open, and began "running off at the mouth about 'I don't want to fight you no more. So why don't you go on home.'" R. 87. Dolby drove away and offered to drive petitioner home, but in order to allow Dolby to return home sooner, petitioner got out of the car after it had gone a few blocks. Petitioner saw Griffin crouching behind Charles McCoy and moving towards him:

> "John [Griffin] was headed directly down the street toward where I was standing. So I put my hand in my pocket and he pushed Charles McCoy in the back and I pulled my gun out of my pocket and I shot it one time. I kind of

At the conclusion of the testimony, the court instructed the jury that it could return a verdict of not guilty, guilty of involuntary manslaughter, guilty of second degree murder, or guilty of first degree murder. R. 102-103. The jury found petitioner guilty of first degree murder, and the court thereupon sentenced him to die.

3/ cont'd.

> shot it up like in the air. I was not trying to hit anybody. I was hoping that, you know, he was turning backward.
>
> Before I fired I saw John crouched behind McCoy for a couple of seconds or so. Charles was still between me and John. Then that is when John pushed McCoy and said, 'Nigger, I am going to make you use what you have got in your pocket.'
>
> That is when I pulled my gun out and shot hoping he would turn around and go back. So he didn't turn. Looked like he was running faster toward me and that is when I put the gun down like this and shot him. When I shot the second time, I was as far from him as from here to that Officer. After I shot the gun, I presumed it hit him. I didn't know because he turned around and looked like he started running back down the street. I put my gun down by my side and walked across the street here."

R. 84. Petitioner said that he fired because "I thought he was going to do something to me," and because "I heard that he was trying to get a gun."R.85.

On April 10, 1974, the Supreme Court of North Carolina affirmed petitioner's conviction and sentence of death, with three Justices dissenting in regard to the death penalty. On April 17, 1974, Chief Justice William A. Bobbitt of the North Carolina Supreme Court stayed execution of the judgment in order to allow a petition for certiorari to be filed in this Court.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner's Grouping of Exceptions and Assignments of Error (R. 127-131) in the Record on Appeal assigned the death sentence in this case as error because:

> "The imposition and carrying out of the death penalty in this case is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 19 and 24, of the Constitution of the State of North Carolina."

Assignment of Error No. 9, R. 131. The Supreme Court of North Carolina rejected this contention on the merits, citing its prior decisions in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973) and State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974).[4/] 202 S.E.2d at 815 (App. A at 13a).

4/ A dissenting opinion stated: "Chief Justice Bobbitt and Justice Higgins and Justice Sharp, dissent as to death sentence and vote to remand for imposition of a sentence of life imprisonment for the reasons stated in the dissenting opinion of Chief Justice Bobbitt in State v. Jarrette, 284 N.C. 625, 666, 202 S.E.2d 721, 744 (1974)." 203 S.E.2d at 815 (App. A at 13a).

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REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In order to avoid burdening the Court with lengthy and repetitious matter, petitioner adopts the "Reasons for Granting the Writ" section of the Petition for Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974), at pp. 11-51, and each of the issues set forth there:

(A) Whether the decision of the North Carolina Supreme Court reinstating the death penalty in that State following Furman v. Georgia, 408 U.S. 238 (1972), is an impermissible evasion of the Furman holding;

(B) Whether such a reinstatement of the death penalty by judicial decision violates the Eighth and Fourteenth Amendment commands of lawfulness in criminal punishments;

(C) Whether the perpetuation of arbitrary sentencing discretion in North Carolina's administration of the death penalty following Furman violates the constitutional rule of that case;

(D) Whether the death penalty is so inconsistent with contemporary standards of decency as to violate the Eighth and Fourteenth Amendments.

Since the Dillard certiorari petition was filed on June 11, 1974, 18 additional persons have been sentenced to die in this country, making a national total of 121 defendants presently condemned to death as a result of a sentence imposed subsequent to the date of the Furman decision. In North Carolina, 12 additional persons have been sentenced to die under the procedures approved in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973), making a total of 41 persons now under sentence of death in North Carolina. 5/

5/ The following death sentences should be added to those listed in footnote 28, pp. 29-31, of the Dillard petition: State v. [illegible], Cumberland County Superior Ct., No. 73-Cr-30529, 73-Cr-30615 (May 16, 1974); State v. Gordon, Mecklenburg County Superior Ct., No. 73-Cr-56187, 73-Cr-56188 (May 29, 1974); State v. Robbins, Guilford County Superior Ct., No. 74-Cr-19674, 74-Cr-19771 (May 31, 1974); State v. Thompson, Rutherford County Superior Ct., No. 74-Cr-1222 (June 1, 1974); State v. Braswell, Caswell County Superior Ct., No. 73-Cr-1439 (June 7, 1974); State v. Rozell Hunt, Anson County Superior Ct., No. 74-Cr-1538 (June 13, 1974); State v. Lowery, Alamance County Superior Ct., No. 73-Cr-8718 (June 13, 1974); State v. Simmons, Nash County Superior Ct., No. 74-Cr-194 (June 13, 1974); State v. Fernando Hunt, Vance County Superior Ct., No. 74-Cr-550, 74-Cr-551, 74-Cr-552 (June 14, 1974); State v. Davis, Lenoir County Superior Ct., No. 74-Cr-1102, 74-Cr-1103 (June 16, 1974); State v. Foster, Lenoir County Superior Ct., No. 74-Cr-1248, 74-Cr-1249 (June 16, 1974); State v. Strickland, Onslow County Superior Ct., No. 74-Cr-3671, 74-Cr-3672, 74-Cr-10568 (June 29, 1974).

Since June 11, 1974, the Supreme Court of North Carolina has vacated death sentences in State v. Anthony Carey, __N.C.___, __S.E.2d __, North Carolina Supreme Court No. 16 (Mecklenburg) (July 1, 1974), and in State v. Albert Carey, __N.C.__, __S.E.2d __, North Carolina Supreme Court No. 19 (Mecklenburg) (July 1, 1974), and has remanded these cases for new trials.

There is sometimes a delay between imposition of a sentence of death and commitment of the condemned prisoner to Death Row in Central Prison, Raleigh, North Carolina. This delay accounts for the fact that some of the sentences listed [illegible] were imposed before June 11, 1974, the date the Dillard petition was filed.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

RESPECTFULLY SUBMITTED,

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APPENDIX A

STATE v. FOWLER

N.C. 801

death penalty did not constitute cruel and unusual punishment.

No error.

Bobbitt, C. J., Higgins and Sharp, JJ., dissented from imposition of death penalty.

1. Criminal Law ⇔1078

Assignments of error not brought forward and argued in defendant's brief were deemed abandoned on appeal. Supreme Court Rule [illegible].

2. Criminal Law ⇔769(4)

Records ⇔Death

When record is void of any proof of objection to charge given by the court at the close of presentation of evidence, there was no evidence of improper charge to the jury, and there was no evidence of improper [illegible] for [illegible] an exception by [illegible] of appellant, there was no evidence of [illegible] proceedings [illegible] the [illegible] law in [illegible].

3. Criminal Law ⇔727, 729(1)

In [illegible] quired to give [illegible] but only a [illegible] law in [illegible] Solicitor [illegible] ancies to be called to [illegible] at [illegible] time, otherwise they are deemed to be waived and will not be considered on appeal.

4. Criminal Law ⇔1122

Recapitulation of evidence given to court to jury was in substantial accordance with requirement to be made presumptively to prejudice of defendant, and in absence of showing by defendant that the court's summary included there was no prejudice.

5. Criminal Law ⇔829(3), 1171

Trial court's summation of evidence regarding State's contentions as to [illegible]

STATE v. FOWLER

No. 31

April 10, 1974

-1a-

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self-defense was amply supported by State's evidence and was not given in such manner that jury could reasonably infer that statement was court's opinion, if defendant had any objection he should have stated it at the time.

6. Criminal Law ⇐772(3)

Trial court's statement in charge to jury as to defendant's contention was not subject to objection that it gave unequal stress to contentions of State.

7. Criminal Law ⇐1056(2)

Exceptions to charge were insufficient to present question of failure to grant request for instruction not part of charge to which exceptions were taken, but part of charge to which exceptions were taken was not full statement of defendant's contentions and was not clear statement of law arising thereon.

8. [illegible]

[illegible] evidence in the [illegible] was error for [illegible] to the effect [illegible] from evidence [illegible] was not [illegible] was [illegible] and were [illegible] a reasonable doubt [illegible] charged.

9. Criminal Law ⇐1154

Verdict will not be set aside on appeal because of error in charge but where specific error is assigned as ground of appeal, it must be considered in connection with charge as a whole.

10. Homicide ⇐29

If person who is to death at time he committed homicide should be [illegible] utterly incapable of [illegible] and proceeded and purpose to kill, [illegible] ment of first-degree murder is absent and the offense is reduced to murder in the second degree.

11. Homicide ⇐293(2)

Although there was testimony that defendant had been drinking, there was insufficient evidence of intoxication by defendant, where only defense was self-defense, so as to require an instruction on intoxication as a defense to charge of murder in the first degree.

12. Jury ⇐131

If prospective juror states that under no circumstances could he vote for verdict that would result in imposition of death penalty, challenge for cause and examination of evidence thereon, but court can properly dismiss juror on challenge for cause.

13. Jury ⇐131(5)

It is permissible to ask prospective juror if he has beliefs or conscientious scruples that would affect his ability to render impartial verdict based solely upon evidence and law as given by court, but juror may not be asked whether he would automatically vote against imposition of capital punishment.

14. Jury ⇐131

State has challenge for cause any juror who would automatically vote against verdict that would require imposition of death penalty without regard to evidence that could be developed at trial of case or who has fixed opinion against imposition of death penalty that would prevent him from making an impartial decision as to defendant's guilt in a capital case.

15. Jury ⇐133, 142

"Peremptory challenges" are challenges that may be made according to the judgment of party entitled thereto and reason for peremptory challenge cannot be required into.

16. Criminal Law ⇐1101(1)

It is primary duty of defense counsel to prepare and docket a true and complete transcript of record for appeal in criminal

case and if it contains errors of omission it is the responsibility of solicitor to file exceptions or cross-case. G.S. § 1-282, 15-180.

17. Jury ⇐142

If defense counsel desires to take exception to action of court in excusing prospective juror he should either have case a stipulation with State setting out matter the reason for excusing juror or should include transcript of voir dire examination as to that juror in case on appeal.

18. Criminal Law ⇐1172(2)

Defendant appealing from [illegible] case on appeal [illegible] by cross of failure of [illegible] transcript of voir dire examination included in case on appeal, [illegible] sion of solicitor to file exceptions or cross-case [illegible] G.S. § 1-282, 15-180.

19. Criminal Law ⇐1042(1)

Inference of drunkenness [illegible] Federal Constitution [illegible] Amend. [illegible] 27, G.S. § 14-7.

On an indictment charging [illegible] defendant [illegible] in the first degree [illegible] a verdict of [illegible]

The State's evidence tended to show that [illegible] of July 1962 [illegible] was [illegible] be in charge [illegible] Griffin's house on Cross Street in [illegible] South Carolina. Wade Griffin was [illegible] with the [illegible] was in charge of defendant was [illegible] and urged him [illegible] was drinking. Griffin walked over to the car, opened the car door open, and said to defendant, "I don't want to fight you no more. I want you to go on home." Griffin then turned to the driver, [illegible] Luther Dolby, and told him to take defendant home, and Dolby started to leave. After Dolby had driven only a short distance down the street, defendant insisted that he stop the car and let him out. [illegible] by coupled with defendant's request, [illegible] defendant got out of the car and started walking toward Griffin. When the two were fairly close, defendant pulled out and shot at Griffin twice, hitting him in the stomach. Griffin [illegible] but [illegible] of the [illegible] blood. As the [illegible] Griffin [illegible] to [illegible] be help after the shots.

The police [illegible] and Griffin was taken to [illegible] A few hours [illegible] upon the scene, [illegible] went to the [illegible] explain what had happened. [illegible] second [illegible] [illegible] attorney [illegible] of rights [illegible] Defendant said that he wanted [illegible] to know that he [illegible] Griffin. According to [illegible] Williams of the Dolby [illegible] court, defendant confessed to the police that he had gotten drunk on [illegible] 1962, and that [illegible] Griffin's statement to the police [illegible] that on 4 July 1962 [illegible] went to Sylvester Jones' [illegible] crap game was in progress. [illegible] and Griffin [illegible] a ten dollar bill [illegible] most of the [illegible] Griffin [illegible] defendant left the game and went to King's Lounge on Rock Quarry Road. Griffin arrived at the Lounge [illegible] shortly after Griffin's arrival he and defendant resumed their argument about the ten dollar bill. Griffin asked defendant to

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come outside with him, and as defendant was walking out, Griffin hit him in the nose, knocking defendant down and breaking his nose. Defendant told the police that at this time he had a .38 caliber pistol in his pocket. He left the King's Lounge and went to his house for awhile, and then decided to catch a ride and go see a friend who lived in the vicinity where the shooting occurred. When he arrived in the area, he saw Griffin and Griffin came over to the car and started to fight defendant again. Defendant then pressured

Griffin had been drinking some beer at the King's Lounge. Following the fight defendant decided to go over to an apartment complex known as Walnut Terrace to see his sister-in-law. At the time defendant did not know that Griffin would be in the area, and he was not out looking for Griffin. He got two rides to the complex, the last being with Johnny Frazier Dolby. When Dolby got to the Walnut Terrace area, he and defendant saw Griffin on the street. Griffin came over to the car, smashed the car door open and told

Griffin then hit defendant, and defendant fell down in the street. Griffin came over to defendant and told him he would kill him. After the car had apparently shorted out, defendant fell trying to stop the car before it hit him. Defendant testified that because he wanted to keep the car the "peace" was possibly broken. Defendant had "popped off" to the effect. Defendant got out of the car and started running down the street. At this point he heard a shot and saw Griffin fall to the ground. Defendant then ran up the street behind Mr. McCue. At this point defendant testified that Griffin got up and that Griffin and defendant were facing each other. Then Griffin said, "Are you going to make good on what you have got in your pocket?" At this point defendant was no longer scared of Griffin. Defendant then shot at Griffin as Griffin was coming forward with his hands. Griffin fell to the ground and defendant stood over him and shot him four times. Griffin was dead when he hit the ground. Defendant then heard that Griffin was looking for a gun and that he was trying to keep Griffin off of him; he did not shoot to kill him.

Atty. Gen. Robert Morgan and Asst. Atty. Gen. Sidney S. Eagles, Jr., Raleigh, for the State.

Chambers, Stone, Ferguson & Lanning, by Charles L. Becton, Chapel Hill, for defendant appellant.

MOORE, Justice.

[1] Assignments of error Nos. 1, 2, 3, 6, and 7 are not brought forward and argued in defendant's brief, and consequently those assignments are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, State v. Crews, 281 N.C. 327, 189 S.E.2d 161 (1972); State v. Mel[illegible], 284 N.C. 137, 199 S.E.2d 409 (1973). Braver, in one of the prongs of the purported assignment of error, we have carefully reviewed the assignment and find them to be without merit.

By his fourth assignment of error defendant asserts that "[t]he trial court erred in its instruction to the jury in the trial portion of the bifurcated hearing of [illegible] and in its instruction of the contentions of the defendant."

[2] [illegible]

[illegible] be proved beyond a reasonable doubt before a verdict of murder in the first degree can be rendered against the defendant. The State may prove these elements in many ways. Ordinarily they are not susceptible of direct proof but may be inferred from circumstances such as ill will, previous difficulty between the parties, declarations of an intent to kill either before or after the infliction of the fatal wound, or when the evidence shows that the killing is done in a brutal and felonious manner.

"Premeditation and deliberation must be shown by circumstances and the jury, among whether there was such premeditation and deliberation, the jury may consider evidence of the absence of provocation and all other circumstances from which he knowingly was committed.

"In determining the question of premeditation and deliberation the jury must take into consideration the conduct of the defendant before and after the time of the killing, circumstances as to [illegible] attending circumstances as to [illegible] whether the act [illegible] be attributed to premeditated design or sudden impulse."

Thereafter, the court fully defined [illegible] and deliberation. With respect to the [illegible] of the charge to which defendant excepts, viewed in the context, it appears that the [illegible] by the court was not an expression of an opinion that there was no evidence of provocation in the case. To the contrary, this instruction was a correct statement of the law in the event [illegible] given by the court, as required by G.S. § 1-180, to assist the jury in reaching a verdict. It is in accord with many well-reasoned decisions of this Court. See State v. Van Landingham, 283 N.C. 253, 195 S.E.2d 297 (1973); State v. Duncan, 270 N.C. 412, 158 S.E.2d 63 (1967); State v. DeBruce, 259 N.C. 73, 129 S.E.2d 601 (1963); State v. Hendry and State v. Chandler, 256 N.C. 674, 124 S.E.2d 791 (1962).

[3,4] Defendant next contends that the manner in which the court summarized the

evidence relevant to the issue that there was no prosecution in the case. The paragraph in the charge complained of is as follows:

"The State's evidence tends to show that the defendant got a ride with Bobby to the Walnut Terrace area; that he had a pistol at the time of going there; that he got out of the automobile of Bobby and returned toward John Griffin after they had words as they passed in the automobile and the State's evidence tends to show that John Griffin did not have a weapon, was not advancing on the defendant in any way, did not make any act or attempt to make any act which would cause the defendant to believe that he was in danger of death or great bodily harm, and that he, without any provocation, shot and killed John Griffin with a pistol."

This recapitulation of the evidence is substantially accurate. The portion of the charge to which defendant excepted is not subject to the objection that it expresses an opinion as to the weight of the evidence. It merely gives the contentions of the State. The jury could not have misunderstood the court's statement as an expression of opinion that the State's evidence was true. The court's statement of the State's contentions was accurate and defendant's evidence was in fact favorable to him. No prejudice appears.

[5] Under the next assignment defendant also contends that the trial court erred in stating the following contention in such a manner that the jury could reasonably infer that this statement was the court's opinion:

"The State contends upon the plea of self defense that there was no evidence that Griffin was at the time making any assault on the defendant or threatening him with an assault, that there was no circumstance from which the defendant might reasonably have believed that he was about to suffer any death or great bodily harm . . ."

This contention was amply supported by the State's evidence. Again defendant has only the choice to this exception between a narrow and a strained construction. Therefore, see State v. Tate, [illegible] 7 Strong, N.C. Digest, Criminal Law [illegible].

[6] Defendant contends that the manner in which the trial court stated defendant's contentions kept evidence favorable to defendant from the jury. The evidence to which the charge complained of is as follows: "The defendant's evidence tends to show that sometime after that, he went back to Bobby Boyd's camp, that he was armed with a pistol and got out of the car, and [illegible] that he was advancing on the defendant in any way, and that he, without provocation, shot and killed John Griffin with a pistol." Defendant contends that here the court, "as if admonished," invaded the province of the jury and gave an opinion that he was not obliged to find the facts as stated by the court. The court's statement of defendant's contentions was accurate and defendant's evidence was in fact favorable to him. No prejudice appears.

By assignment of error No. 5 defendant asserts that "[t]he trial court erred in failing to give a full instruction on the cu-

cumstances under which the jury could return a verdict of not guilty . . ." Defendant contends that the charge limited in effect the verdict of not guilty to a finding by the jury that defendant killed the deceased in self-defense, and that under the decisions in State v. Woods, 226 N.C. 289, 37 S.E.2d 897 (1946), and State v. Ramey, 274 N.C. 325, 163 S.E.2d 376 (1968), the court erred in failing to instruct the jury that if the State failed to satisfy it from the evidence beyond a reasonable doubt that the defendant was guilty of murder in the first degree or murder in the second degree or manslaughter, the jury should return a verdict of not guilty.

[7] The statement and the exception on which it is based do not comply with well established appellate rules. [illegible] Nos. 37 and 39 to part of the charge [illegible] or attempt to point out [illegible] charge to which exception is taken. These exceptions are insufficient to present for consideration on appeal the question whether the court failed to declare and explain the law arising on the evidence given in the case. Nor does the exception upon the ground that the charge fails to state the contentions of defendant arising on the evidence present for review any question which could have been presented by a request for special instructions. State v. Tate, [illegible] 7 Strong, N.C. Digest, Criminal Law [illegible].

[8] The court correctly instructed the jury as to murder in the first degree and murder in the second degree as follows:

"I instruct you, members of the jury, that if you find from the evidence beyond a reasonable doubt that on or about the [illegible] of the year the defendant, Jesse Thurman Foulke, did unlawfully, willfully and without premeditation and deliberation and with malice, but in the heat of passion suddenly aroused by an assault upon him by the deceased, John Griffin, Jr., which assault was sufficient to provoke in the defendant's mind a fear that he was in imminent danger of death or great bodily harm, and while he was under the influence of such fear, shoot and kill John Griffin with a pistol, and thereby proximately caused the death of John Griffin, and that Jesse Thurman Foulke then intended to kill John Griffin and that he went with malice and premeditation and deliberation, if you find all of these facts to exist beyond a reasonable doubt, it would be your duty to return a verdict of guilty of murder in the first degree. If you do not so find or have a reasonable doubt as to any one or more of these things, you would not return a verdict of guilty of murder in the first degree.

"If you do not find the defendant guilty of murder in the first degree, you must determine whether he is guilty of murder in the second degree. Upon this charge it will be your duty to find whether or not the defendant killed John Griffin with a deadly weapon, to wit, a pistol, and whether or not in doing so he acted unlawfully and with malice, but without premeditation and deliberation. If the defendant, acting in the heat of passion suddenly aroused by an assault upon him by the deceased, John Griffin, Jr., which assault was sufficient to provoke in the defendant's mind a fear that he was in imminent danger of death or great bodily harm, and while he was under the influence of such fear, shot and killed John Griffin with a pistol, and thereby proximately caused the death of John Griffin, and that Jesse Thurman Foulke then intended to kill John Griffin and that he went with malice and premeditation and deliberation, if you find all of these facts to exist beyond a reasonable doubt, it would be your duty to return a verdict of guilty of murder in the second degree. If you do not so find or have a reasonable doubt as to any one or more of these things, you would not return a verdict of guilty of murder in the second degree.

"If you do not find the defendant guilty of murder in the first degree or murder in the second degree, you must determine whether he is guilty of manslaughter. And upon that charge, if you find from the evidence beyond a reasonable doubt that on or about the [illegible] of the year the defendant did on the day in question shoot John Griffin, proximately causing his death, but you are satisfied that he did so without malice, in the heat of sudden passion [illegible] aroused by an assault upon him by the deceased, John Griffin, Jr., which assault was sufficient to provoke in the defendant's mind a fear that he was in imminent danger of death or great bodily harm, and while he was under the influence of such fear, shot and killed John Griffin with a pistol, and thereby proximately caused the death of John Griffin

tect himself, he did not have to establish for that belief, then it would be your duty to return a verdict of guilty of voluntary manslaughter.

"If, although you are satisfied beyond a reasonable doubt that the defendant did intentionally shoot John Caffey and thereby proximately cause his death, if you are satisfied, not beyond a reasonable doubt, but are satisfied that at the time of the shooting the defendant did have reasonable ground to believe and did believe [illegible] the deceased John Caffey [illegible] or reasonably appeared to the defendant to be about to kill him or to inflict upon him great bodily harm, and that the defendant did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm, then it would be your duty to return a verdict of not guilty of voluntary manslaughter."

The trial judge inadvertently failed to give such instruction. The necessity for such instruction is not affected by the fact there was plenary evidence upon which the jury could have a finding that a bullet wound inflicted upon Mabry by defendant proximately caused his death. *State v. Redmon*, supra; 176 N.C. 753, 97 S.E. 31; 63 (1950)." Second, *State v. Woods*, supra.

As in *Rooney*, the trial judge in the present case inadvertently failed to give such instruction. This was error. However, in

"Even [illegible] the verdict [illegible] it does not [illegible] [illegible] a new trial [illegible] [illegible] First, the verdict of [illegible] as the jury could [illegible] [illegible] not. *State v. Moore*, 227 N.C. [illegible] [illegible] in the charge as it related to [illegible] the first degree. On the [illegible] when the jury is instructed that it may find defendant guilty of murder in the first degree, murder in the second degree, manslaughter, or not guilty, and the verdict is guilty of murder in the second degree, an error in the charge as to manslaughter will require a new trial. In such event it cannot be known [illegible] or the verdict would have been man-

slaughter if the jury had been properly instructed. But where, as here, the jury was properly instructed as to both degrees of murder and yet found defendant guilty of murder in the 1st degree rather than the second degree, it is clear that error in the charge as to manslaughter was harmless. In *State v. Moore*, 124 N.C. 805, 32 S.E. 15, the jury found that beyond all reasonable doubt the prisoner slew the deceased wilfully, deliberately and with premeditation and was guilty [illegible] [illegible] the deceased was [illegible] from the [illegible] [illegible] the charge as to manslaughter was [illegible] [illegible] in the charge as to manslaughter would require a new trial. In such event it cannot be known [illegible] or the verdict would have been mansl

having transpired at the trial of the matter.

"1. That the jury was not transcribed.

"2. That the State questioned the prospective jurors with regard to their attitudes about the death penalty and advised them that death would be the penalty as a result of a first degree murder verdict.

"3. That two persons were excused for cause because of their views on capital punishment."

Now defendant seeks by this assignment of error, . . . [1] that the exclusion of the only witness who was allowed to testify for the defendant was not transcribed and is not available for review, . . . [2] that the prospective jurors were questioned as to their attitudes about the death penalty and advised that death would be the penalty as a result of a first degree murder verdict, . . . [3] that two persons were excused for cause because of their views on capital punishment.

. . . .

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. . . .

against its infliction? Was an excused juror's response ambiguous? Was one of the jurors excused because he said that he could not vote for the death penalty in this particular case? We do not know the answer to these questions; there is no transcript."

In effect it is now defendant's position that the stipulation entered into by defense counsel and the State is insufficient in that it does not provide the Court with adequate basis for determining whether the two jurors already excused for cause because of their opposition to capital punishment and their inability to render an impartial verdict on the issue of guilt or innocence in accordance with the trial court's instructions were properly excused. We agree that the stipulation is deficient in certain respects, but we do not think it is fatal to the validity of the trial. The stipulation does not purport to be a complete transcript of the proceedings at which the two jurors were excused. It merely recites that they were excused for cause because of their opposition to capital punishment and their inability to render impartial verdicts on the issue of guilt or innocence in accordance with the trial court's instructions. It